BEFORE THE

STATE OF CALIFORNIA

OCCUPATIONAL SAFETY AND HEALTH

APPEALS BOARD

In the Matter of the Appeal of: BLUE DIAMOND MATERIALS, A DIVISION OF SULLY MILLER CONSTRUCTION 1100 East Orangethorpe Ave., Suite 250 Anaheim, CA 92801 Employer	Docket No. 02-R5D2-1268 **DECISION AFTER RECONSIDERATION**

The Occupational Safety and Health Appeals Board (Board), acting pursuant to authority vested in it by the California Labor Code and having taken the petition for reconsideration filed in the above entitled matter by Blue Diamond Materials, a Division of Sully Miller Construction (Employer) under submission, renders the following decision after reconsideration.

JURISDICTION

Beginning September 6, 2001, a representative of the Division of Occupational Safety and Health (the Division) conducted an investigation at a place of employment maintained by Employer at 3555 E. Vineyard Avenue, Oxnard, California (the site).

On March 1, 2002, the Division issued Employer four citations, one of which contained six violations. One citation, classified as serious/accident-related, alleged a violation of section 5194(h)(2)(E)(failure to provide hazard information training) of the occupational safety and health standards and orders found in Title 8, California Code of Regulations.[1]

Employer timely appealed the citations. All but the citation pertaining to section 5194(h)(2)(E) were resolved prior to the commencement of the administrative hearing held on March 9, 2004. The hearing was held before an administrative law judge (ALJ) for the Board who issued a decision on February 8, 2005 that upheld the violation, the classification, and the $18,000 proposed penalty.

[1] Unless otherwise specified all references are to sections of Title 8, California Code of Regulations.

On March 15, 2005, Employer petitioned for reconsideration. The Division filed an answer to the petition on April 19, 2005. The Board took the petition under submission on April 29, 2005.

EVIDENCE

Employer operates an asphalt batch plant. The plant operator, Johnny Hurtado, requested that employee Ted Garcia flush-out a pug mill that had been used to mix aggregate into a rubberized asphalt mixture. The pug mill was located approximately 12 feet above ground. Garcia used the standard procedure to wash down the mill, which was to spray #2 diesel fuel into the mill to soften the asphalt remaining in the corners, so that it would not harden and break the mill's mixing paddles the next time the mill was used.

Hurtado observed Garcia spraying the fuel from an office window and turned away before hearing an explosion. He turned back in time to see Garcia cart wheeling over the railing and falling to the ground. He also saw fire in the pug mill. No one else saw the accident occur. Employer stipulated that Garcia received serious injuries, as defined in Labor Code section 6302(h).

In response to a document request from the Division that asked for all training records pertaining to Garcia, Employer produced a number of documents, none of which pertained to training on hazardous substances or on #2 diesel. Also, the two Employer personnel who testified (Hurtado and Tommy Real, Garcia's co-worker) indicated that they had not received such training. They further testified they were unaware of any hazards posed by spraying #2 diesel into the pug mill prior to the accident.

Employer's Hazard Communication Program (HCP) was also entered into evidence. The HCP included Material Safety Data Sheets (MSDS) for a variety of substances, including #2 diesel and various forms of asphalt. There is no evidence that Garcia received a copy of the HCP or either of the MSDSs for #2 diesel.

The MSDSs[2] for #2 diesel list a variety of physical and health hazards, state the flashpoint[3] for the substance (125°F), characterize its flammability as "moderate" and list its OSHA flammability class as "combustible liquid." The MSDSs further state that the fuel may be ignited by heat, flames, or other sources of ignition.

Additional testimony was offered regarding the temperature to which the mixes in the pug mill are heated as well as temperature readings of the metal components in the pug mill taken by Tommy Real on an unspecified date

[2] There were two #2 diesel MSDSs in the HCP, each of which was provided by a different manufacturer.
[3] The flashpoint is defined to be the temperature at which a liquid gives off a vapor in sufficient concentration to ignite.

following the accident. All of the evidence reflected temperatures greatly above #2 diesel's 125ºF flashpoint.

In its petition for reconsideration, Employer contested the relevance of much of the evidence, including Hurtado and Real's training, and the temperatures entered into evidence. With respect to the former, Employer correctly noted that the citation only pertains to the failure to train Garcia. Regarding the latter, Employer argued that temperatures taken at times other than the time of the accident are not indicative of the conditions present when the accident occurred. Employer argued that, at the time of the accident, the pug mill had likely cooled some when Garcia began rinsing it because it had been shut off and was likely empty for a time before the process began. Employer further contended that the lack of a prior explosion, despite over 20 years of using this cleaning method, demonstrates that it did not know, and could not have known, of the hazard.

ISSUES

1. Did the Division prove Employer violated section 5194(h)(2)(E)?
2. Did the Division prove the serious/accident-related classification of the violation?

FINDINGS AND REASONS FOR DECISION AFTER RECONSIDERATION

1. The Division proved Employer violated section 5194(h)(2)(E).

Section 5194(h)(2)(E) states as follows:

> Employees shall be trained in the physical and health hazards of the substances in the work area, and the measures they can take to protect themselves from these hazards, including specific procedures the employer has implemented to protect employees from exposure to hazardous substances, such as appropriate work practices, emergency procedures, and personal protective equipment to be used.

Section 5194 contains a number of definitions relevant to our analysis. Hazardous Substance is defined to be "Any substance which is a physical hazard or a health hazard . . . ." Health Hazard is defined to include ". . . substances which are . . . irritants . . . and agents which damage the lungs, skin, eyes, or mucous membranes." Physical hazard is "a substance for which there is scientifically valid evidence that it is a combustible liquid, a compressed gas, explosive, flammable . . ." MSDS is defined to be "Written or printed material concerning a hazardous substance which is prepared in accordance with section 5194(g)."

Given that #2 diesel fuel's MSDSs list various physical hazards (i.e., it is characterized as both a combustible liquid and as flammable) and health hazards (i.e., it is an eye and skin irritant and can damage the lungs), we find that it is a hazardous substance as the term is used in section 5194(h)(2)(E).

Although Employer argues that the #2 diesel, as used at its facility, did not require training, section 5194(h)(2)(E) provides no exceptions or qualifiers that permit us to find that a substance defined to be hazardous only requires training if used in specified ways. In addition, Employer presented no evidence to show that the manner in which it used #2 diesel did not pose eye or skin irritant hazards, or altered the substance's status as a "combustible liquid." Moreover, the evidence demonstrated that temperatures in the pug mill can well exceed the flashpoint for #2 diesel. As discussed further below, given the lack of evidence to suggest that fuel was not introduced into the mill until assurances were made that the temperature dropped well below the flashpoint, we cannot agree that the manner in which the substance was used obviated the need for training.

We are further persuaded that Employer failed to train Garcia on the hazards associated with this substance. Employer produced a variety of training documents in response to the Division's document request, none of which evince training that Garcia received regarding hazardous substances or #2 diesel. Moreover, although Hurtado and Real's lack of training, and their lack of awareness regarding the hazards posed by #2 diesel, is not dispositive of Garcia's knowledge and training, it is circumstantial evidence, which we may properly consider. [4] We find the lack of training records for Garcia, coupled with Garcia's co-workers ignorance on the issue, as well as their admitted lack of training, compelling.

In addition, Employer's lack of countervailing evidence to show Garcia received the requisite training is legally significant. When the Division provides evidence that an element of a violation on which it bears the burden of proof more likely than not occurred, and an employer does not present any evidence that the element did not occur or exist, we have found the Division has met its burden as to that element. *Nibbelink Masonry Construction Co.*, Cal/OSHA App. 02-1399, Decision After Reconsideration (Dec. 20, 2007), citing, *Gaehwiler Construction Co.* Cal/OSHA App. 76-580, Decision After Reconsideration (Oct. 16, 1980).

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[4] An element of a violation may be proven through circumstantial evidence. *Harbor Sand & Gravel, Inc.,* Cal/OSHA App. 01-1016, Decision After Reconsideration (June 5, 2003); *ARB,Inc.,* Cal/OSHA App. 93-2084, Decision After Reconsideration (Dec. 22, 1997). The Board has repeatedly held that direct and circumstantial evidence, as well as reasonable inferences are to be considered in determining whether the preponderance of the evidence burden has been met. E.g., *Hensel Phelps Construction Co.*, Cal/OSHA App. 01-1618, Decision After Reconsideration (Jul. 6, 2007); *Brydenscot Metal Products*, Cal/OSHA App. 03-3554, Decision After Reconsideration (Mar. 28, 2006).

Based on the foregoing, we find that the Division established a violation of section 5194(h)(2)(E).

2. The Division did not prove the serious/accident-related classification.

To classify a failure to train as serious, the Division must establish that the lack of training regarding the hazard would result in a substantial probability of serious injury or death. *Jerlane, Inc. dba Commercial Box and Pallet,* Cal/OSHA App. 01-4344, Decision After Reconsideration (Aug. 20, 2007); *Sully Miller Contracting Co.* Cal/OSHA App. 99-896, Decision After Reconsideration (Oct. 30, 2001). "Substantial probability" refers to the probability that death or serious physical harm will result *assuming* an accident occurs as a result of the violation. *Jerlane, Inc., supra*; Labor Code section 6432(c). The Division must demonstrate the specific hazard that endangers an employee and the probable consequences of an accident related to the failure to instruct about the hazard. *Tri/Valley No.7 (Distribution Center)*, Cal/OSHA App. 82-1029, Decision After Reconsideration (Dec. 18, 1985), citing, *Tenneco West, Inc.,* Cal/OSHA App. 79-535, Decision After Reconsideration (Jan. 24, 1985); *Siskiyou Forest Products,* Cal/OSHA App. 01-1418, Decision After Reconsideration (Mar. 17, 2003).

Here, the Division focused on the hazard created by exposing #2 diesel fuel to heat and the potential for an explosion or fire to occur. The Division inspector testified that, if an explosion occurred, he would expect an exposed employee to experience burns and injuries that would require at least 24 hours of hospitalization. He further stated that a fall from 12 feet would result in serious injuries.

The inspector's assertions regarding the substantial probability of serious injury were stated categorically, and the Board has repeatedly held that opinions regarding the probability of serious injury must be substantiated. E.g., *MV Transportation, Inc.*, Cal/OSHA App. 02-2930, Decision After Reconsideration (Dec. 10, 2004); *R. Wright & Associates, Inc. dba Wright Construction & Abatement*, Cal/OSHA App. 95-3649, Decision After Reconsideration (Nov. 29, 1999). Substantial probability must be supported by reasonably specific scientific or experience-based rationale, or generally accepted empirical evidence. *Brydenscot Metal Products*, Cal/OSHA App. 03-3554, Decision After Reconsideration (Nov. 2, 2007); *R. Wright & Associates, supra;* see also, *Ja Con Construction Systems, Inc. dba Ja Con Construction* Cal/OSHA App. 03-441, Decision After Reconsideration (Mar. 27, 2006). In addition, the evidence must, at a minimum, show the types of injuries that would more likely than not result from the violation. See, *Findly Chemical Disposal, Inc.* Cal/OSHA App. 91-431, Decision After Reconsideration (May 7, 1992).

While the degree of substantiation needed to support an assertion that serious injury or death is more likely than not to occur has varied in prior Board decisions, the support for the inspector's assertions here is negligible. No evidence was offered to suggest the inspector had investigated other, similar accidents, that he had researched these issues, or that he was experienced or particularly familiar with the consequences of falls or the use of diesel fuel around heat. Similarly, although the inspector testified that he would expect to see injuries and burns requiring more than 24 hours of hospitalization if an accident such as this occurred, this vague and unsupported assertion fails to satisfy the requirement to specify the types of injuries that would more likely than not result from the violation. The Board may not assume facts that are not in evidence, or take official notice of an element of a violation on which the Division bears the burden of proof. *Architectural Glass & Aluminum Co., Inc.* Cal/OSHA App. 01-5031, Decision After Reconsideration (Mar. 22, 2004).

Given the paucity of evidence to demonstrate that serious physical harm or death would more likely than not result from an accident caused by the referenced violation, we find that the Division did not prove the serious classification of the citation. Because an accident-related finding is dependent on upholding the serious classification of the violation, it, too, fails.

We, therefore, hold that the violation is properly classified as general and calculate the appropriate penalty accordingly. Because the Division classified the violation to be serious/accident-related, Employer was not afforded penalty credits. See, Cal. Labor Code section 6319(d); Title 8, section 336(d)(7).

The Board has held that maximum credits and the minimum penalty allowed under the regulations are to be assessed when the Division fails to justify its proposed penalty. *Plantel Nurseries*, Cal/OSHA App. 01-2346, Decision After Reconsideration (Jan. 8, 2004). However, when, as here, the change in classification results in a change in penalty, the Board may calculate the penalty in accordance with the Director's regulations, sections 335 and 336, to the extent possible. See, *JSA Engineering, Inc.* Cal/OSHA App. 00-1367, Decision After Reconsideration (Dec. 3, 2002). If the record fails to provide sufficient information to allow us to properly calculate a credit, Employer will be given the maximum credit. *Plantel Nurseries, supra.*

We determine that the severity of the violation is properly rated as high, which results in a base penalty of $2,000. We rate extent as low because the charging language of the citation only referenced the failure to train Garcia. Had it alleged a broader failure to train, our assessment might have been different. This reduces the penalty to $1,500. We also find that likelihood is low, which results in a $1,000 penalty. We credit Employer's representation that it employed 87 workers and afford a 10% reduction for size, which further reduces the penalty to $900. We find good faith to be fair based on the gaps in training evident in the record and reduce the penalty to $750. Maximum credit (10%) is given for history and a 50% abatement credit is afforded given the lack

of information in the record on these issues. *Plantel Nurseries, supra*. This results in a penalty of $335, which we find to be appropriate.

DECISION AFTER RECONSIDERATION

The Board affirms the violation of section 5194(h)(2)(E), reduces the classification to general, and assesses a $335 civil penalty.

CANDICE A. TRAEGER, Chairwoman
ROBERT PACHECO, Board Member

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD
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